Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

JAMES CLYDE LAMON,

Petitioner,

v.

LYNETTE CONNER, LYNNE TURNER, LISA DAVIS, LEE REDDISH, SANDRA ROGERS, ED RICKS, CHARLES STINES, COLQUITT COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether immunity protects state social workers and prosecutors from 42 U.S.C.A. § 1983 suits at common law, when they create a retaliatory conspiracy; fraudulently misrepresent their intentions to parents; violate their own investigation protocols; manipulate a disturbed child's "repressed memory"; suppress medical evidence that a supposed child sex abuse victim is a virgin; coerce and manipulate the disturbed child's testimony; suppress vital exculpatory facts as to mental hospitals — "repressed memory" — attempts at recantation — and medical exam results; and secretly manipulate the grand jury.

II. Whether fundamental rights to family relations, due process, freedom from state employees' conspiracies, malicious prosecutions and the right to trial by jury are valueless, when child abuse is claimed and the citizens are naive enough to live in Georgia.

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Appendix B — Order And Judgment Of The United States District Court For The Middle District Of Georgia, Thomasville Division Dated And Filed March 31, 1999 ..... 3a

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit opinion (App. A) is unreported. The district court opinion (App. B) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on May 3, 2000. The Court of Appeals entered an order that affirmed the district court's grant of summary judgment in favor of the Defendants/Respondents. Petitioner also appeals the dismissal of his state law claims against the Defendants/Respondents.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Seventh Amendment and the Fourteenth Amendment, Section 1 of the Constitution of the United States and the Civil Rights Act of 1871, 42 U.S.C.A. § 1983.

The full text of these constitutional and statutory provisions are set forth in the Appendices to the Petition.

STATEMENT OF THE CASE

Petitioner James "Clyde" Lamon is a physician in Colquitt County, Georgia. Respondents are state employee social workers, prosecutor and investigator. Petitioner asserts that the Respondents defrauded, conspired and retaliated against him because he and his wife Debra have been outspoken critics of the Colquitt County Department of Family and Children Services [*DFACS*]. Dr. and Mrs. Lamon actively supported folks in their county that *DFACS* and the prosecuting attorney wrongly accused of child abuse. The Lamons created a mid-Georgia chapter of *V.O.C.A.L.*[1] and made many visits, telephone calls and pleas to state and county officials to reign in the Gestapo-like tactics of the Colquitt County *DFACS*. But the Lamons had an Achilles heel.

Clyde's daughter Katherine Britt Lamon is a seriously disturbed child. Clyde's former spouse, Paula Lamon is a psychologically dysfunctional person as well. Some years after Britt left Clyde's custody and went to live with her mother, Britt telephoned Clyde and exclaimed that her mother was psychologically and physically assaultive. Needing to get Britt across state lines and into treatment, the Lamons swallowed their pride and called *DFACS* for help. Unknown to the Lamons at the time, *DFACS* personnel were conspiring to put an end to Clyde and Debra's criticisms of their tactics.

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1. V.O.C.A.L. "Victims of Child Abuse Laws" is a national organization of parents, grandparents and children opposed to the manner in which some states implement the Child Abuse Prevention and Treatment Act ("*CAPTA*") 42 U.S.C.A. § 5101 (1976).

With the unwitting aid of an incompetent attorney, *DFACS* workers defrauded Clyde into signing off immediate custody and control of his disturbed daughter. *DFACS* workers traveled to Florida, transported Britt to Georgia and began to publish in the community that the child was disturbed because Clyde had sexually abused her on a routine basis while she was in his custody years before.[2]

Longstanding members of Hopewell Baptist Church in their town, Clyde and Debra learned of numerous extra-marital affairs, sexual peccadilloes and downright perversions among *DFACS* workers.[3] Clyde and Debra increased their complaints when they discovered that the very *DFACS* workers who were "investigating" the phony "repressed memory" allegation, were

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2. Britt's "sexual abuse" story was based on notoriously unreliable "recovered memories" from a brief psychiatric hospitalization and treatment in Florida months before. While in that hospital, she also "recovered" memories of being shot at ten times, raped etc. Any competent review of Britt's psychiatric records will reveal a constantly escalating series of outrageous stories of abuse, abduction, attempted murder and mayhem culled from the child's deranged mind.

3. In addition to loudly criticizing the extra-marital affair between *DFACS* supervisor Sandra Rogers and the county sheriff, Debra Lamon learned of the video-taped sexual perversions of *DFACS* supervisor Lynn Turner and her (high school principal) husband. Debra's friend Joanne Knight confided that around the time of the *DFACS* investigation, Lynn and Ed Turner made a sexually perverted video tape which Ed Turner tricked Joanne into watching saying: "Everything you see on the tape is what I want to do to you. . . .". When Joanne's husband Jimmy beat the snot out of Ed, *DFACS* supervisor Lynn Turner came to Joanne and Jimmy and said: "I know Ed and I have a problem . . . This was not the first time. . . ." begging Joanne and Jimmy to keep quiet so the Turners would not lose their jobs.

the same folks whose sexual and moral behavior was so astonishing. When the *DFACS* personnel responsible for Britt, refused to meet with her, Debra took Jimmy Knight with her to a school board meeting in a silent protest against the *DFACS* folks spreading rumors about Clyde.

The next day, the Lamon's attorney called them into her office and screamed:

> What the hell were you doing at that School Board meeting last night? You know you've done it now. Your husband's in for the fight of his life. I told you those little old ladies down at *DFACS* are going to have a lot to do with whether your husband's prosecuted. Now you've done it. He's going to be in for the fight of his life.

It was at this point that the Respondents conspired to turn their "investigation" of the "repressed memories" into a criminal indictment. They were gonna get Clyde and fix Debra too.

And how did they do it? Since the police wouldn't touch the "repressed memory" claim with a ten-foot-pole, the *DFACS* Respondents talked prosecutor Stines into an "investigation" by Georgia Bureau of Investigation officer Ed Ricks. Stines, Ricks and the *DFACS* Respondents further conspired and set out to: (1) violate their own investigation protocol; (2) hide the fact that Britt was trying to recant the phony "repressed memory" story; (3) suppress the medical evidence that Britt was **a virgin** when she lived with her dad; (4) bury evidence of their manipulation and threats to the disturbed girl that she had to stick to the sex abuse story; (5) try to keep folks from finding out that Clyde had passed *two* independent polygraph analyses on the phony allegation;

and (6) sneak around behind the judge in charge, to manipulate the grand jury into indicting Clyde.[4]

They got their indictment. Following closing arguments in the criminal trial, the jury came back in minutes, found Clyde not guilty on all six allegations and told him to sue. And sue he did.

THE PROCEEDINGS BELOW

Petitioner filed this matter in the Superior Court of Colquitt County, Georgia. Respondents filed a Notice of Removal to the United States District Court. Motions for remand and responses were filed. An Order denying remand was entered by the U.S. District Court for the Middle District of Georgia, July 11th, 1995. Some discovery was undertaken. Respondents filed a motion for summary judgement, August 29th, 1996. The case was removed from the pre-trial calendar. Disputes as to material facts were submitted by the parties. The motions were submitted to the district court November 13th, 1996. Twenty-seven months later, the Court ordered the parties to submit legal arguments on the issue of discretionary function.

On March 31st, 1999 the District Court entered an order dismissing the matter in its entirety. Petitioner appealed to the Eleventh Circuit. On May 3rd, 2000 the Eleventh Circuit affirmed.

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4. *Please note*: As required by the rules of the Eleventh Circuit, all of these factual allegations were supported by specific citations to the record. This record is in the possession of that Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS AND THE SUPREME COURT

A. In Georgia Child Abuse Claims, There Are No Civil Rights

Live in Georgia? Falsely accused of child abuse? Be afraid. Be very afraid. Because the State's employees may create phony evidence (as in this case); suborn perjury (as in this case); tamper with the grand jury (as in this case); and get you criminally indicted. If you're lucky enough to escape criminal penalties (as in this case); and your jury actually tells you to sue the lying State employees (as in this case); the federal district court will ignore the law and throw your case in the toilet. So, let's suppose you are a physician (as in this case); with the financial resources to mount an appeal. What happens? You get the Eleventh Circuit. Yep, the very same place the *Ku Klux Klan Act* was written to in 1871.

Yes, the Eleventh Circuit, where **immunity** is writ large, and it's not a civil rights violation to shoot a fleeing suspect in the back (long as he's black), or rape the citizens, or beat up innocent bystanders.[5] If you lived in Colorado, or

5. *See, e.g., Wright v. Whiddon*, 591 F.2d 297 (CA 11, 1992) Cops shoot fleeing suspect in the back — dead — immune; *Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 11176 (CA 11, 1994) Director and supervisors at facility where child raped — (Cont'd)

Pennsylvania or even Texas you'd have a remedy. At least, you could get a trial,[6] but not in Georgia. If it's a child abuse

(Cont'd)
immune; *Spivey v. Elliott*, 41 F.3d 1497 (CA 11, 1995) State residential school child sexually assaulted — state and employees immune; *McCoy v. Webster*, 47 F.3d 404 (CA 11, 1995) Guard puts prisoner where he knows he'll get beaten — immune; *Wooten v. Campell*, 49 F.3d 696 (CA 11, 1995) Crazy dad kills kid in DFACS care — DFACS immune; *Haney v. City of Cumming*, 69 F.3d 1098 (CA 11, 1995) Crazy woman takes pills, Cops just watch her die — immune; *Almand v. DeKalb County*, 103 F.3d 1510 (CA 11, 1997) Rapist cop — immune; *Powell v. Georgia Dept of Human Resources*, 114 F.3d 1074 (CA 11, 1997) DFACS caseworkers and dead baby — DFACS immune; *Ensley v. Soper*, 142 F.3d 1402 (CA 11, 1998) Cops beat innocent bystander — immune.

6. *See, e.g.:* Arkansas: *Fogle v. Benton County Scan*, 665 F. Supp. 729 (W.D. Ark. 1987); California: *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (CA 9, 1980); *Millspaugh v. County Dept. of Public Welfare of Wabash County*, 937 F.2d 1172 (CA 7, 1991); *Calabretta v. Floyd*, 189 F.3d 808 (CA 9, 1999) *and Wallis v. Spencer*, 193 F.3d 1054 (CA 9, 1999); Colorado: *Malik v. Arapahoe County Dept. of Social Servs.*, 191 F.3d 1306 (CA 10, 1999) Warrant obtained by falsehood and retaliation; Connecticut: *Williams v. Hauser*, 948 F. Supp. 164 (D.C. Conn. 1996) False info used to obtain warrant; Illinois: *Fittanto v. Klein*, 788 F. Supp. 1451 (N.D. Ill. 1992) Arrest based solely on five-year-old's allegations; Indiana: *McCrum v. Elkhart County Dept of Public Welfare*, 806 F. Supp. 203 (N.D. Ind. 1992) Even convicted child molesters get a trial on fact issues; Kansas: *Franz v. Lytle*, 997 F.2d 784 (CA 10, 1993) Illegal Search of Child's Body; Louisiana: *Austin v. Borel*, 830 F.2d 1356 (CA 5, 1987) No immunity for false claims; *Doe v. State of Louisana*, 2 F.3d 1412 (CA 5, 1993) "Witch hunt" caseworkers get only qualified immunity; Massachusetts: *Germany v. Vance*, 868 F.2d 9 (CA 1, 1989) Caseworkers know charges false; Michigan: *Achterhof v. Selvaggio*, 886 F.2d 826 (CA 6, 1989) No absolute
(Cont'd)

claim and there's a social worker involved, there are no civil rights. Why? "Immunity."

B. This Court Has Spoken to Issues of Immunity in Analogous Contexts:

> Section 1983 immunities are "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. at 421, S.Ct., at 1974. If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether Sec. 1983's history or purposes nonetheless counsel against recognizing the same immunity in Sec. 1983 Actions.

Tower v. Glover, 467 U.S. 914, 104 S. Ct. 2820, 2825 (1984).

(Cont'd)
immunity for "opening" a case; New York: *Doe v. County of Suffolk*, 494 F. Supp. 179 (1980) Only good-faith immunity for malicious claims; Oklahoma: *Snell v. Tunnell*, 920 F.2d 673 (CA 10, 1990) No immunity for retaliating social workers; Oregon: *Tennyson v. Children's Ser. Div.*, 775 P.2d 1365 (1989) Only qualified immunity when taking child; Pennsylvania: *Rinderer v. Del. County Children and Youth Serv.*, 703 F. Supp. 358 (E.D. Pa. 1987) Only qualified immunity for malicious social worker; *Wendy H. v. City of Philadelphia*, 849 F. Supp. 367 (E.D. Pa. 1994) Social worker's misconduct requires trial; *Miller v. City of Philadelphia*, 954 F. Supp. 1056 (E.D. Pa. 1997) No immunity for lying social worker; Texas: *Morris v. Dearborne*, 69 F. Supp. 868 (E.D. Tex. 1999) No immunity for use of phony evidence; Vermont: *Wilkinson v. Balsam*, 885 F. Supp. 651 (D. Vt. 1995) Intent and knowledge are jury questions. No immunity for false claims; *Wilkinson v. Russell*, 182 F.3d 89 (CA 2, 1999) Caseworkers not free to make phony claims.

> Where we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983.

Justice Scalia, with whom Justice Blackman, and Justice Marshall join, dissenting in part. *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 1945 (1991).

> The courts that have accorded absolute immunity to social workers appear to have overlooked the necessary historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under § 1983.

Justice Thomas with whom Justice Scalia joins, dissenting. *Hoffman v. Harris*, 511 U.S. 1060, 114 S. Ct. 1631, 1632 (1994).

The federal courts in almost every state have held out for citizens' federal rights in social worker cases. But not in Georgia. Why should they? In Georgia, they've been getting around the Seventh Amendment and the *Ku Klux Klan Act* [42 U.S.C.A. § 1983] for more than a hundred years. And recently, they've developed a ridiculous, yet potent way to do it.

C. Georgia's "*Job Description — Immunity Doctrine*"

For the sake of argument, we'll call the Eleventh Circuit's latest torture test, the *Rich-Harbert "Job Description — Immunity Doctrine"*. Here's how it works:

> his actions in conducting the investigation and writing and submitting the probable cause affidavit at issue were carried out in the performance of his normal job duties and were within the authority delegated to him by his employer, the State Attorney.

Rich v. Dollar, 841 F.2d 1558, 1564 (CA 11, 1988). So, he gets "Immunity", because this State employee defendant demonstrated: ". . . . that he was acting 'within the scope of his discretionary authority when the allegedly wrongful acts occurred.' " *Rich v. Dollar*, 841 F.2d 1558, 1564 (CA 11, 1988). And as the Eleventh Circuit reiterated in *Harbert*, that in *Rich v. Dollar:*

> We concluded that the defendant had acted within his discretionary authority not because that authority included filing unfounded probable cause affidavits, but because his duties included writing and submitting probable cause affidavits. . . .

Harbert International, Inc. v. James, 157 F.3d 1271 (CA 11, 1998). Therefore, if the State employee is doing her job — boom "Immunity". Doesn't matter if they're doing illegal stuff, shooting the citizens in the back, raping the women, who cares, they're immune!

D. In Georgia, "Immunity" is even easier for Prosecutors

If you're a prosecutor in a child abuse case in Georgia, it gets even better. While immunity is being passed around when the cops are beating bystanders *Ensley v. Soper*, 142 F.3d 1402 (CA 11, 1998) or raping the women *Almand v. DeKalb County*, 103 F.3d 1510 (CA 11, 1997) prosecutors in child abuse contexts don't even merit scrutiny. As the Eleventh Circuit has said here, the prosecutor and his investigator can: (1) enter into a conspiracy with retaliation bent social workers; (2) hide the fact that a child witness is trying to recant phony "repressed memory" stories; (3) hide medical evidence that the child was **a virgin** when her dad was supposed to be having routine intercourse with her; (4) bury evidence of your manipulation and threats to the disturbed girl; (5) try to keep folks from finding out that the dad had passed *two* independent polygraph analyses; and (6) sneak around behind the judge in charge, to manipulate the grand jury into an indictment. And when the aggrieved citizens sue, their Seventh Amendment rights to trial mean nothing.

By-in-large, citizens are not denied their 42 U.S.C.A. § 1983 remedies in the other federal circuits[7] or by this

7. *See, e.g.*, Arizona: *Robichaud v. Ronan*, 351 F.2d 533 (CA 9, 1965) No immunity when coercing confessions; Florida: *Lewis v. Brautigam*, 227 F.2d 124 (CA 5,1955) No immunity when coercing confessions; *and Madison v. Purdy*, 410 F.2d 99 (CA 5, 1969) No immunity when participating in conspiracies to deny rights; Illinois: *Hampton v. City of Chicago*, 484 F.2d 602 (CA 7, 1973), *cert. denied*, 415 U.S. 917 (1974) Prosecutors engaged in planning raids for the purposes of committing murder were not covered by immunity; Indiana: *Holton v. Boman*, 493 F.2d 1176 (CA 7, 1974)

(Cont'd)

honorable Court.[8] This Petitioner should not be denied § 1983 remedies merely because his lives in Georgia.

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No immunity when participating in conspiracies to deny rights; Minnesota: *In re Scott County Docket*, 618 F. Supp. 1534 (D.C. Minn. 1985): Prosecutors and social workers not immune from suit over reckless sex abuse case; New York: *Martin v. Merola*, 532 F.2d 191 (CA 2, 1976) No immunity for defamation in press conferences *and Doe v. Russotti*, 503 F. Supp. 942 (1980) and *Redcross v. County of Rensselaer*, 511 F. Supp. 364 (N.D.N.Y. 1981) Prosecutor not immune when coercing a witness *and Hill v. City of New York*, 45 F.3d 653 (CA 2, 1995): Only qualified immunity for coercing witness to give false evidence; Pennsylvania: *Tomko v. Lees*, 416 F. Supp. 1139 (1976) No immunity when coercing witness to be informant; Texas: *Hart v. O'Brien*, 127 F.3d 424 (CA 5, 1997) Prosecutor only qualified immunity when providing false information; Vermont: *Robison v. Via*, 821 F.2d 913, 918 (CA 2, 1987) No immunity for child seizure. *See also* Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to its Absolute Means*, 59 Alb. L. Rev. 1135, 1193 (1996) noting that "the funneling of fabricated evidence through a witness with absolute defamation immunity should not filter out liability . . ."

8. *See, e.g., Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 1943 (1991) No immunity for advising police during investigation; *Buckley v. Fitzsimmons* , 509 U.S. 259, 113 S. Ct. 2606 (1993) No immunity for fabrication of evidence; *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502 (1997) No immunity for participation as complainant in police investigation.

II.

THE ISSUES PRESENTED ARE IMPORTANT

What is it that CBS's *60 Minutes* and ABC's *20-20* and NBC's *Dateline* and PBS's *Frontline* all have in common? Their producers and viewers all know that the manner in which alleged child abuse is processed under "*CAPTA*" can be a civil rights nightmare.

A. The *CAPTA* Civil Rights Nightmare

To be eligible for CAPTA funds, each state must provide for the reporting of known or suspected child abuse, immunity to reporters from civil and criminal liability, investigation of reports by the proper state authority, and insurance of the health and welfare of any children in a household where abuse is detected. CAPTA offers incentives for states to establish programs for the research, identification, prosecution, and treatment of child abuse. As Professor Richard Gardner of Columbia University explains, this "carrot-and-stick" incentive program, where federal funding matches state spending, resulted in the present "child abuse establishment."[9] Professor Gardner notes that this establishment consists of social workers, psychiatrists,

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9. *See, e.g.,* Gardner, Richard A., *Appratchiks Turn "Child Abuse" into "Witch Hunt", NJ LJ, Mar. 1993, at A17. And see* Gardner, Richard A., *Sex Abuse Hysteria: Salem Witch Trials Revisited* (Cresskill, New Jersey: Creative Therapeutics, Inc., 1991); Lorandos, D. & Campbell, T., *Myths and Realities of Sexual Abuse Evaluation and Diagnosis: A Call for Judicial Guidelines.* 7 Issues in Child Abuse Accusations 1 (1995); *and* Campbell, T.W., *Smoke and Mirrors: The Devastating Effects of False Sexual Abuse Claims* (New York: Insight Books, 1998).

psychologists, and law enforcement officials. Gardner instructs: By enacting laws that criminalize non-reporting and instituting an impenetrable screen of immunity, Congress has created an establishment that, by its very nature, actually encourages charges of child abuse whether they are reasonable or not:

> The incentive system actually encourages evaluators of child abuse investigations to conclude that abuse exists in a case under investigation. To find no signs of abuse could adversely affect the agency by reducing funding. No funding is provided for families when an investigation determines that the report was unsubstantiated, regardless of the harm the investigatory process may have caused the parents and children.[10]

B. Growing Numbers of False Allegations of Child Abuse

When one considers that two thirds[11] of all reported cases of child abuse turn out to be unsubstantiated, the civil rights implications are profound. Researchers like Professor Gardner are not the only people aware of the number of false cases of child abuse propelled by CAPTA all over the country. After an investigation that included interviews with over 250 social workers, therapists, judges, doctors and families, the San Diego county Grand Jury issued a fifty-six

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10. Gardner, Richard A., *Appratchiks Turn "Child Abuse" into "Witch Hunt", NJ LJ, Mar. 1993, at A17.*

11. Author, *Child Maltreatment 1997: Reports from the States to the National Child Abuse Neglect and Data System* (Washington, D.C., 1999): U.S. Department of Health & Human Services.

page report in 1992 indicating that the child protection system was, "out of control, with few checks and little balance."[12]

The growing number of false accusations against parents throughout the United States has been referred to as the "third great wave of hysteria."[13] Another researcher has commented that CAPTA has spawned: "The war against children. Every year, we let hundreds of children die, force thousands more to live with strangers, and throw a million innocent families into chaos. We call this 'child protection'."[14] Still another researcher comments that scientists like Professor Gardner are not the only ones to recognize CAPTA civil rights nightmares: "Many social workers have become disheartened with the abuse of authority in their own departments, and have helped give birth to a new term now being applied to the child welfare system: 'the child abuse industry'."[15]

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12. Klicka, Christopher J., *The Right Choice*, Noble Publishing Associates (1994), p. 252, 268 (1993) — quoting Okerblom Wilkins, *Child Protection System Ripped*, The San Diego Union Tribune, Feb. 7, 1992, at A1, A19.

13. Gardner, *supra,* at note 10. The first, the Salem Witch Trials, in 1692, lasted only a few months. Nineteen people were hanged before it became apparent that the accusations were suspect. In the 1950s, at the time of the McCarthy hearings, hysteria over the communist threat resulted in the destruction of many careers. The current hysteria, which began in the early 1980s, is by far the worst with regard to the number of lives that have been destroyed and families that have been disintegrated.

14. Klicka, *supra* at note 12, page 268.

15. Pride, Mary, *The Child Abuse Industry* (Westchester: Crossway Books, 1986), pages 13-14.

C. Blanket Grants of Immunity Serve to Exacerbate a Difficult Civil Rights Problem

When considering the objective impact of the threat of liability on social workers, courts that have chosen to grant blanket immunity have failed to "cite[ ] facts or figures to establish that any particular level of civil liability would cripple government, and the opposite possibility is never discussed — that government and official immunity might underdeter unconstitutional conduct."[16] Professor Beerman notes that although this honorable Court has recognized the adverse effect that exposure to liability could have on officials, it does not follow that the imposition of civil liability would have a debilitating effect upon government. Beerman opines that the Court's approach therefore fails to acknowledge the costs of "decreased compliance with the rights enforced through § 1983 or the possibility that granting immunity "might underdeter unconstitutional conduct."[17]

We must not forget that immunity works against both parents and children much like a two-edged sword. Shielded from the risk of possible litigation, reckless or bad faith actions and bad faith inaction, continue to fall "underdeterred" on children as well as their parents. Every crazy claim like those in this case, denigrates the suffering of every abused child.

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16. Beerman, Jack, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stanford L. Rev. 51 (1989) page 83.

17. *Id.*

D. With Precedents Like This One, Georgia Social Workers and Prosecutors Can Do Anything

We must remember that *this case* began when the devoutly Christian Petitioner and his wife became offended beyond the breaking point by the Gestapo-like tactics of the Colquitt County *DFACS*. Petitioner and his wife were angered and offended that people they considered to be morally bankrupt, were spreading rumors in the community about Dr. Lamon routinely sexually abusing his pre-teen daughter. Knowing that her neighbors had exposed some of the sexually perverted hijinks of one of these Respondents, Debra Lamon made a silent protest at the local school board meeting.[18] The Respondents retaliated and the Eleventh Circuit said: "So what. . . ."

Petitioner asserts that this is not government of the people and by the people, this is government *above* the people. Why? Because this case illustrates that you just can't get to a jury in Georgia. Indeed, the Seventh Amendment right to trial when read with the *Ku Klux Klan Act*, provide the clear path to a remedy that Congress intended. And Congress intended this path to be viable *in Georgia*, but a review of the District court opinion and the Eleventh Circuit's offensive rebuff illustrate that the civil rights nightmare of CAPTA is far worse in Georgia than elsewhere.

E. Summary Judgment Was Entirely Improper Here

The terrible acts of the Respondents here and the documentation provided in the discovery that was completed, *at the very least*, provided ". . . genuine factual issues that

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18. *Supra*, at notes 1, 2 and 3.

properly [could] be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Indeed, in this Court instructed that the standard for summary judgement in federal court: ". . . mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, *there can be but one reasonable conclusion as to the verdict.*"[19] This Court went on to instruct that: "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed."[20] Since this Court has previously instructed that particularly in civil rights cases, motive, intent, objective knowledge and reasonableness must be determined, Petitioner argues that the courts in Georgia were just not listening when this Court informed that summary judgement requests must be construed with due regard: ". . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury." *Celotex Corp. v. Catertt*, 477 U.S. 317 (1986).

Time and again the federal courts have made it clear that the courts should not make findings of fact where reasonable minds could differ[21] and that sitting judges should

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19. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) *emphasis added*

20. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986)

21. *See, e.g., Alder v. WalMart Stores, Inc.*, 144 F.3d 664 (CA 10, 1998); *Eiland v. Trinity Hosp.*, 150 F.3d 747 (CA 7, 1998); *Smith v. Brenoettsy*, 158 F.3d 908 (CA 5, 1998); *Trustees of BAC*

(Cont'd)

not usurp a plaintiff's Seventh Amendment right to a jury.[22] But that is exactly what's done in Georgia. And this is particularly telling when issues like "good faith" and "objective reasonableness" are involved.

In most federal courts, *qualified* immunity: ". . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341(1986). Premised upon "good faith", an examination of the cases in which a defense of good faith was propounded by state actors against a damage claim under 42 U.S.C.A. § 1983 discloses that most of the federal courts have further elaborated the parameters of the good-faith defense. Almost all federal courts, when faced with this defense require not only of an analysis of the subjective intention or belief of the state actor in question but also an objective evaluation of the reasonableness of the conduct or belief .[23] What self

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Local 32 Ins. Fund v. Fantin Enterprises, Inc., 163 F.3d 965 (CA 6, 1998); *Moreland v. Las Vegas Metropolitan Police Dept*, 159 F.3d 365 (CA 9, 1998); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452 (CA 3, 1998); *McPherson v. Coombe*, 174 F.3d 276 (CA 2, 1999).

22. *See, e.g., Monarch v. Knitting Machinery Corp. v. Sulzer Morate GmbH*, 139 F.3d 877 (CA 2, 1998), *on remand* 1998 WL 338106; *Reynolds v. County of San Diego*, 84 F.3d 1162 (CA 9, 1996); *Craig v. Eberly*, 164 F.3d 490 (CA 10, 1998); *Garratt v. Walker*, 121 F.3d 565 (CA 10, 1997), *opinion vacated in part on reh. en banc*, 164 F.3d 1249; *McGinn v. Burlington Northern R Co.*, 102 F.3d 295 (CA 7, 1996); *Mount v. U.S. Postal Serv*, 79 F.3d 531 (CA 6, 1996); *FDIC v. Elder Care Serv, Inc.*, 82 F.3d 524 (CA 1, 1996).

23. *See, e.g.*, Colorado: *United States v. Janusz*, 135 F.3d 1319 (CA 10, 1998) Defendant's honest belief that venture will ultimately

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respecting jurist could honestly say that happened here? No, summary judgement was entirely improper. This case illustrates, that the analysis this Court requires and every other federal court follows, just doesn't happen in Georgia.

III.

OUTRAGEOUS VIOLATIONS LIKE THOSE SHOWN HERE WILL CONTINUE UNTIL THIS COURT PROPERLY DESCRIBES THE NATURE & SCOPE OF IMMUNITY IN SUSPECTED CHILD ABUSE CASES FROM 42 U.S.C.A. § 1983 SUITS

A. Blanket Immunity Is the Scoundrel's Best Refuge

With blanket grants of immunity, the first thing scoundrels do in civil rights litigation, is scream for immunity. We can see it everywhere.[24] And it's craziest of

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succeed does not constitute "good faith" if, in carrying out plan, he knowingly uses false representations or pretenses with intent to perceive; Illinois: *Continental Bank NA v. Modansky,* 997 F.2d 309 (CA 7, 1993) Exercise honesty in fact, and prudence in exercise of discretion conferred by contract; Massachusetts: *Boston Children's Heart Foundation, Inc. v. Nadal-Ginard,* 73 F.3d 429 (CA 1, 1996); Missouri: *In re Sherman,* 67 F.3d 1348 (CA 8, 1995) Courts look to what transferee objectively knew or should have known, instead of examining transferee's actual knowledge from subjective standpoint. Bankr. Code, 11 U.S.C.A. § 548(a), (c); Texas: *Babb v. Dorman,* 33 F.3d 472 (CA 5, 1994) "Qualified immunity" or "good faith immunity" shields government officials performing discretionary functions from liability unless their conduct violates clearly established statutory or constitutional rights of which reasonable person would have known. *And see* 61 ALR Fed. 7 § 3.

24. Here are some recent examples: Colorado: *Paradis v. Montrose Memorial Hosp.*, 157 F.3d 815 (CA 10, 1998) Hospital
(Cont'd)

all in child abuse cases. The real tragedy beyond the denigration of every *actual* case of child abuse, is that these *carte blanch* retaliations are against *fundamental rights.*

That the Constitution protects family relationships and a parent's right to the care, custody, control, and management

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administration retaliated against nurse employees who blew whistle, then ask for immunity; Illinois: *Markham v. White*, 172 F.3d 486 (CA 7, 1999) Sexually harassing cops, ask for immunity; Kansas: *Franz v. Lytle*, 997 F.2d 784 (CA 10, 1993) Cops make warrantless search of home and child's body then claim immunity; Louisiana: *Wooley v. City of Baton Rouge*, 211 F.3d 913 (CA 5, 2000) Cops make unreasonable decisions then ask for immunity; Nevada: *Nunez v. Davis*, 169 F.3d 1222 (CA 9, 1999) Judge fires administrator for not favoring his re-election campaign, then asks for immunity; New Mexico: *Kamplain v. Curry County Bd of Com'rs*, 159 F.3d 1248 (CA 10, 1998) Board of Commissioners ban citizen from their meetings, then claim immunity; New York: *Morrison v. Lefevre*, 592 F. Supp. 1052 (S.D.N.Y. 1984) Crooked prison guards plant contraband in retaliation for prisoner lawsuits, then ask for immunity; Ohio: *Estate of Dietrich v. Burrows*, 167 F.3d 1007 (CA 6, 1999): Cops retaliate against former cops then ask for immunity; Puerto Rico: *El Dia, Inc. v. Rossello*, 165 F.3d 106 (CA 1, 1999) Governor pulls gov't. ads from newspaper, then claims immunity; Tennessee: *Spurlock v. Satterfield*, 167 F.3d 995 (1999) Crooked cop manufactures evidence, invents probable cause then claims immunity; Texas: *Atwater v. City of Lago Vista*, 165 F.3d 380 (CA 5, 1999) Cop stops, handcuffs and arrests woman for not wearing seat belt then claims immunity; Utah: *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226 (CA 10, 1999) State school principal on notice of sexual assaults, did nothing to prevent child rape — claimed immunity; Virginia: *McVey v. Stacy*, 157 F.3d 271 (CA 4, 1998) Airport commissioners fire manager when she would not "certify" their false statements and phony meeting notes, then ask for immunity; Wisconsin: *Ralston v. McGovern*, 167 F.3d 1160 (CA 7, 1999): Sgt. of Guards won't give prisoner his pain mediation following radiation for Hodgkin's disease, then asks for immunity.

of their children is well-established.[25] In this case, all Dr. and Mrs. Lamon wanted to do was get his dysfunctional daughter across state lines and into a residential treatment program. So, the Petitioner swallowed his pride and made an overture to the very *DFACS* workers he and his wife had been opposing for the *DFACS* treatment of other community members. And they had him. And now they were going to teach him a lesson.

Not only did Respondents begin the rumor mill about Petitioner and routine sex with his pre-teen daughter, they defrauded him into signing off his rights to control his daughter's placement. And then it got worse, a lot worse. But this is not the only case of social workers using the awesome power of the state to retaliate against parents.

B. Retaliating Social Workers and Civil Rights

The Court of Appeals for the Sixth Circuit noted a case worker retaliating against parents "stating that she did not 'like to be made a fool of' and then expressing animosity when she could not "go and get the children herself" because the parents ". . . had messed with the wrong person . . ."[26] That court required a trial into those issues. In this case, the retaliating social workers did *and said* the same things, but you can't even get a trial in Georgia.

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25. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Prince v. Massachusetts*, 321 U.S. 158 (1994); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

26. *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 201 (CA 6, 1987).

The Court of Appeals for the Tenth Circuit denied immunity to two social workers who decided to continue an investigation of child abuse despite the fact that the district attorney and local police charged with that responsibility refused to become involved. The social workers didn't care, they removed the kids anyway.[27] That's just what happened to this Petitioner, but thanks to the Eleventh Circuit — no trial here.

The Federal District Court in Pennsylvania faced a retaliating caseworker who threatened: "You are going to go my way or I'll force you to go to court and you will go that way!"[28] The Court noted that the parents complaints regarding the caseworker's coercion to get: "compliance with her investigation and regarding her alleged conduct in exaggerating or inventing charges of child abuse before the dependency petition was filed are sufficient to state substantive due process a claim."[29] Same complaints here, but apparently these are not substantive due process rights in Georgia.

Faced with the same dilemma, the Court of Appeals for the Fourth Circuit instructed that child abuse investigators have a duty to investigate information that would clarify matters prior to separating children from their parents,[30] but that's not what happens in Georgia. In Georgia, the Eleventh Circuit says : ". . . do what you want to do . . ."

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27. *Snell v. Tunnell*, 920 F.2d 673 (CA 10, 1990).

28. *Faulkner v. Reeves*, 1992 WL 96286, 2 (E.D. Pa. 1992).

29. *Id.* at page 11.

30. *Sevigny v. Dicksey*, 846 F.2d 953, 957 (CA 4, 1988).

The Court of Appeals for the Second Circuit noted: "Case workers cannot be free to substantiate a claim of abuse, for instance, by ignoring over-whelming exculpatory information or by manufacturing false evidence. . . ."[31] That's exactly what happened to this Petitioner, but when he complained the Eleventh Circuit said there were "no merits" in his appeal.

Dealing with retaliating social workers the Court of Appeals for the Tenth Circuit instructed: "Officials cannot reasonably assume that the law permits them to obtain a custody order in retaliation for a parent's retaining counsel and through reckless omission of probative facts to a magistrate."[32] But the Eleventh Circuit makes this sort of thing the correct protocol for Georgia!

And it's getting worse. Just last year the Court of Appeals for the Ninth Circuit faced up to California social workers and:

> Escondido police officers, evidently acting on the basis of a non-existent court order, seized the children, aged two and five, placed them in a county-run institution, and several days later, without obtaining judicial authorization and without notifying their parents, took them to a hospital for the performance of highly intrusive anal and vaginal physical examinations. The children were not returned to their parents for approximately two and one-half months. All of

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31. *Wilkinson v. Russell*, 182 F.3d 89, 104 (CA 2, 1999).

32. *Malik v. Arapahoe County Dept. of Social Servs.*, 191 F.3d 1306, 1316 (CA 10, 1999).

> this occurred after a mental patient who had a long history of delusional disorders and was confined to a mental institution told her therapist a fantastic tale of Satanic witchcraft within her family and an impending child abuse sacrifice.

Wallis v. Spencer, 193 F.3d 1054, 1059 (CA 9, 1999).

Finally, in Texas a Federal District Judge was astonished at "facilitated communication" being used to determine that a mute four-year-old was sexually abused by her parents.[33] The Texas Judge noted that there was evidence that the "facilitator" and caseworkers ". . . violated state law and TDPRS policy by omitting material from their reports, and fabricating other information."[34] That's just what happened here. In this case, the phony "repressed memory" evidence is even sillier than "facilitated communication". But in Georgia, who cares?

There are three common threads in all of these examples: (1) the federal courts respected the aggrieved citizen's rights; (2) the federal courts didn't hand out blanket grants of immunity; and (3) the aggrieved parents didn't live in Georgia.

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33. *Morris v. Dearborne*, 69 F. Supp. 2d 868 (E.D. Tex. 1999). Facilitated communication is a nutty process by which an adult "facilitator" holds a developmentally disabled child's arms and helps that person "type" out their "allegations" on a machine like a word processor.

34. *Morris v. Dearborne*, 69 F. Supp. 2d 868, 885 (E.D. Tex. 1999).

C. It is Time for This Court to Describe the Proper Nature & Scope of Immunity in Child Abuse

In construing the language of 42 U.S.C.A. § 1983, this honorable Court has often concluded that the statute was intended "to give a broad remedy for violations of federally protected civil rights." *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 685 (1978). The legislative history surrounding the passage of Section 1983 indicates that it was meant to provide a federal right of action because without such redress, "the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961). While many of its decisions have resolved issues under Section 1983, the Court has left unsettled the appropriate level of protection to be provided to social workers who have violated the constitutional rights and privileges of an individual in the context of child abuse accusations. Since *Hoffman v. Harris* 114 S. Ct. 1631 (1994) and *Doe v. Bennett*, 114 S. Ct. 1189 (1994) postponed this Court's analysis, this area of law has become a myriad of conflicting decisions among federal and state courts. It is time for this Court to describe the proper nature & scope of immunity in the child abuse context.

CONCLUSION

This case illustrates the civil rights problems found in the implementation of CAPTA and child abuse. Some Federal Courts are passing out blanket immunity. Some are trying to determine how to apply this Court's *Conn. v. Gabbert*, __ U.S. __, 119 S. Ct. 1292 (1999) qualified immunity test to the conflicted dilemma of childrens', parents' and family rights.[35] And then there's Georgia. The outrageous acts done by the Respondents in this case are offensive to the very nature of our federal society. The grievous wrongs described in the Petitioner's claims and in the factual support to this petition, must be addressed or the *Ku Klux Klan Act of 1871* and one hundred twenty-eight years of its application stand for nothing.

Respectfully submitted,

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35. *See, e.g.*, Lorandos, Demosthenes, *Secrecy & Genetics in Adoption Law &Practice*, 27 Loyola University of Chicago Law Journal 277 (1996) providing a detailed discussion of rights in conflict between the State's police and *parens patriae* powers and the rights of parents, children and families.

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 3, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10815
Non-Argument Calendar

D. C. Docket No. 95-00028-6-CV-WLS

JAMES CLYDE LAMON,

Plaintiff-Appellant,

versus

LYNETTE CONNER, LYNNE TURNER, LISA DAVIS, LEE REDDISH, SANDRA ROGERS, et al,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(May 3, 2000)

Before COX, BLACK and WILSON, Circuit Judges.

PER CURIAM:

Appellant James Clyde Lamon appeals the district court's grant of summary judgment in favor of Appellees,

who consist of several employees of the Colquitt County Department of Family and Children Services, an agent with the Georgia Bureau of Investigation, and an Assistant District Attorney for the Southern Judicial Circuit in Moultrie, Georgia, on Appellant's 42 U.S.C. § 1983 complaint. Appellant also appeals the dismissal of his state law claims against Appellees. Appellant contends the district court erred in concluding: (1) Appellee Stines was entitled to absolute prosecutorial immunity from suit; (2) all remaining Appellees were entitled to qualified immunity because their conduct did not violate clearly-established statutory or constitutional rights of which a reasonable person would have known; and (3) Appellant's state law claims required dismissal because Appellant failed to supply notice as required by the Georgia Tort Claims Act (GTCA).

Our review of the district court's grant of summary judgment is plenary. *See Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). We will affirm the district court if, after construing the evidence in the light most favorable to the nonmoving party, we find there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See id.* After reviewing the record, we find no merit to Appellant's arguments and conclude the district court was correct to grant summary judgment in favor of Appellees.

AFFIRMED.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, THOMASVILLE DIVISION DATED AND FILED MARCH 31, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

6:95-CV-28(WLS)

JAMES CLYDE LAMON,

Plaintiff,

vs.

LYNETTE CONNER, LYNNE TURNER, LISA DAVIS, LEE REDDISH, SANDRA ROGERS, ED RICKS, CHARLES STINES, COLQUITT COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES,

Defendants.

ORDER

This above-styled action arises from alleged violations of the plaintiff's constitutional rights after the plaintiff was acquitted on charges in state court. Presently before the Court is the Defendants' Motion for Summary Judgment (Doc. No. 39). For the reasons discussed below, the Court finds the defendants' motion should be granted.

Appendix B

FACTUAL BACKGROUND

Because there is no significant variation between the parties' respective statements of facts, the following factual account of the material facts, which reflects the evidence viewed in the light most favorable to the plaintiff, controls our disposition of the motion.

The action at hand arises after Georgia attempted to prosecute James Lamon ("Lamon") on charges of molesting his daughter, Katherine Britt Lamon ("Britt"). He brings suit against the Colquitt County Department of Family and Children Services ("DFACS") and several of its employees: Lynette Conner, Lynne Turner, Lisa Turner, Lee Reddish, and Sandra Rogers. Pl's Stmt. of Undisputed Material Facts at ¶1. He also brings this action against Ed Ricks, an agent with the Georgia Bureau of Investigation ("GBI"), and against Charles Stines, the Assistant District Attorney who prosecuted the case. *Id.* at ¶¶2, 3.

Britt had emotional problems. *Id.* at 5. While at St. Johns River Hospital, Britt reported that her father had molested her. These allegations were reported to the Florida Human Resource Services, who in turn informed Defendant Lee Reddish ("Reddish"), a DFACS investigator in the county where the alleged abuse took place. DFACS obtained custody of Britt after the plaintiff's attorney, Bill McCalley, moved to have temporary custody placed with DFACS, which was granted by the Superior Court of Colquitt County. Although Britt was originally to be placed in a long term facility, the defendants were unable to place her in the intended facility because it closed down. Instead, Britt was placed in a foster

home. Rogers Depo. at 29-30. While under DFACS custody, Britt was permitted to enroll in Valdosta State University and take college courses. Pl.'s Stmt. Material Facts. While in foster care, Lamon voiced concerns over Britt's promiscuity, among other concerns, but never filed any written complaints. Pl.'s Stmt. of Material Facts at ¶14; Defs.' Stmt. of Material Facts at ¶14.

In November 1993, DFACS moved to appoint a guardian ad litem for Britt. Bill McCalley stated on behalf of the plaintiff that appointing a guardian ad litem was not necessary as the department was "doing a good job of representing Britt's interest and there is no conflict there." Defs' Br. Supp. Summ. J., Ex. E at 7. Lamon asserts his attorney was not serving his best interest by making such statements. Lamon's Depo. at 93. In December 1993, Lamon consented to legal custody being placed with DFACS. Pl.'s Stmt. of Material Facts at ¶16. After the plaintiff was acquitted, DFACS filed a petition to change custody back to the plaintiff. *Id.* at ¶17; Defs.' Br. Supp. Summ. J., Ex. H. (Order to Terminate Custody).

Before Lamon was prosecuted, Reddish investigated the charges of child molestation at DFACS, which consisted of conversations with Jolynn Solomon of Florida HRS, reviewing a psychological report by Dr. Kim Kazimour, considering Bill Talley's interview with Britt, and videotaping an interview with Britt. Reddish Depo. at 16-34. Stines was informed about the case in April 1993, and talked to Lee Reddish and Lisa Davis about the case generally, but did not direct further investigative work. Stines' Depo. at 8, 16-17, 27. Based on the information gathered in the

investigation, Stines decided to present the case to the grand jury, which returned an indictment against Lamon on the charges of child molestation and aggravated sodomy. Stines Depo. at 19-23. The trial was held in January 1995 and the jury acquitted Lamon of all charges. Crim. Tr. 612.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Court is required to "resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in his or her favor." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (quotations and citations omitted).

The moving party carries the initial burden of showing that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The substantive law governing the case determines which facts are material, and "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). For issues on which the non-movant bears the

burden of proof at trial, the moving party "simply may show — that is, point out to the district court — that there is an absence of evidence to support the non-moving party's case. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the non-moving party will be unable to prove its case." *Fitzpatrick*, 2 F.3d at 1116 (quotations and citations omitted).

If the moving party fails to overcome this initial burden, the Court must deny the motion for summary judgment without considering any evidence, if any, presented by the non-moving party. *Fitzpatrick*, 2 F.3d at 1116. If, on the other hand, the moving party overcomes this initial burden, then the non-moving party must show the existence of a genuine issue of material fact that remains to be resolved at trial. *Id.* Moreover, the adverse party may not respond to the motion for summary judgment by summarily denying the allegations set forth by the moving party. Rather, the adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

II. ANALYSIS

A. Eleventh Amendment Immunity:

The defendants assert that the Eleventh Amendment bars the plaintiff from seeking a remedy in a federal forum against a state, its agencies, or its employees in their official capacity. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). The plaintiff concedes

its claims against DFACS may not proceed. He counters that the claims against the defendants, other than DFACS, may proceed in their individual capacity. The Court recognizes that a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S. Ct. 873, 877, 83 L.Ed.2d 878 (1985). As such, it is no different from a suit against the State itself. *See, e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 3104-05, 87 L.Ed.2d 114 (1985); *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690, n.55, 98 S. Ct. 2018, 2035, n.55, 56 L.Ed.2d 611 (1978). Accordingly, the Court hereby dismisses DFACS and any federal claims against the defendants in their official capacity, but not in their individual capacity.

B. Absolute Immunity of the Assistant District Attorney

The defendants assert that the prosecutor is entitled to absolute immunity for his actions as a prosecutor because the conduct embraced in the plaintiff's complaint was "intimately associated with the judicial phase of the criminal process." Defs.' Br. Summ. J. at 11. The plaintiff counters that a prosecutor is immune only if he is acting as an advocate and is not entitled to absolute immunity for actions which occurred during the investigative phase of the case. Pl.'s Resp. Br. at 30. Specifically, the plaintiff alleges that the actions taken before Stines brought the matter in front of the grand jury was investigatory, and therefore, not protected by absolute immunity.

The Supreme Court has defined the basic parameters concerning the circumstances under which a prosecutor is

entitled to absolute immunity for his or her actions or whether qualified immunity applies. A state prosecutor has absolute immunity during the initiation and pursuit of a criminal prosecution, including presenting the state's case at trial. *Buckley v. Fitzsimmons*, 509 U.S. 259, 272, 113 S. Ct. 2606, 125 L.Ed.2d 209 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976). Even an "out-of-court 'effort to control the presentation of [a] witness' testimony' is entitled to absolute immunity because it is 'fairly within [the prosecutor's] function as an advocate.' " *Id.* at 272-273. Furthermore, a prosecutor is granted absolute immunity in "the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* at 273. Yet, duties that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings, such as administrative or investigatory work, are not entitled to absolute immunity. *Buckley*, 509 U.S. at 273. A court must focus on the prosecutor's conduct and determine whether the challenged actions were "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, 96 S.Ct. 984, or "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State."[1] *Buckley*, 509 U.S. at 273, 113 S.Ct. 2606.

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1. The Supreme Court has given some direction as to actions that should be considered prosecutorial versus investigatory. The Court has identified "[e]valuating evidence and interviewing witnesses" are preparatory steps that a prosecutor takes to be an effective advocate and, thus, on the absolute immunity side of the

(Cont'd)

Appendix B

In reviewing the plaintiff's allegations against Stines, and resolving all reasonable doubts about the facts in favor of the plaintiff, the Court finds no acts which would be outside the protection of prosecutorial immunity. The plaintiff challenges the acts of Stines which occurred during the "investigatory phase" of the case. The only act the plaintiff alleges was investigatory, and hence not protected by absolute immunity, was the interview Stines conducted with Britt on the day she went before the grand jury. Pl.'s Resp. Br. at 31. The plaintiff contends that because Stines encouraged Britt to testify against her father without regard to the veracity of such testimony, Stines is not immune. Pl.'s Resp. at 31. In this way, it appears that the plaintiff challenges whether Stines remained within the scope of his prosecutorial functions by interviewing Britt before the case was taken to the grand jury without asking whether she was telling the truth. According to Britt's affidavit, Britt met with Stines for the first time on the day she appeared before the grand jury. Britt Affidavit ¶9. Many courts have already reviewed the actions of interviewing witnesses before their appearance in front of the grand jury. The Eleventh Circuit has held that a prosecutor is entitled to absolute immunity for interviewing witnesses before presenting them to the grand jury. *Mullinax v. McElhenney*, 817 F.2d 711, 715 (11th Cir. 1987). In fact, it has been recognized that failure to interview witnesses before presenting their testimony to the grand jury would constitute negligence on the part of the prosecutor. *Cook v.*

(Cont'd)

line. *Buckley*, 509 U.S. at 273, 113 S.Ct. 2606. However, "searching for the clues and corroboration" and "plan[ning] and execut[ing] a raid" are investigative steps taken to gather evidence, and hence deserve only qualified immunity. *See id.* at 273-74, 113 S.Ct. 2606.

Houston Post, 616 F.2d 791, 793 (5th Cir. 1980) (holding that certain investigative activity prior to the presentation of a case to the grand jury, such as interviewing witnesses who will appear before the grand jury, falls "within the *Imbler* shelter.") *See also Rose v. Bartle*, 871 F.2d 331, 345 (3rd Cir. 1989) (holding that preparing for grand jury proceedings by attempting to solicit perjured testimony is not in the investigatory stages of a proceeding; merely using the word "investigatory" cannot forestall dismissal on immunity grounds.) Hence, interviewing Britt before she testified in front of the grand jury clearly falls within the prosecutor's absolute immunity, even if he did not ask Britt, "Are you telling the truth?" The plaintiff has not shown any specific facts that show a genuine issue for trial with respect to whether the prosecutor committed any acts in an investigative role, such as directing, advising, assisting, and participating with the police in obtaining evidence. Accordingly, the Court finds that the doctrine of absolute immunity applies to Stines' alleged conduct and that he should be dismissed from this suit.

C. Qualified Immunity

The defendants assert that they are entitled to qualified immunity because even taking the plaintiff's allegations as true, they do not amount to a violation of the plaintiff's federal constitutional or statutory rights. Qualified immunity applies when government officials who are performing discretionary functions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed.2d 396 (1982). This doctrine

recognizes that, "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' " *Id.* at 819, 102 S. Ct. at 2739 (citations omitted). Suits against government officials for damages against them individually are costly for both the defendants as well as for our society generally. "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Id.* at 814, 102 S. Ct. at 2736 (citations omitted).

Qualified immunity is a question of law for the courts. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985). The Eleventh Circuit uses a two-step analysis to determine whether qualified immunity is available. First, the defendants must show that the challenged conduct was within the scope of their discretionary authority. *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995). To establish this element of their defense, the defendants must prove that the actions were (1) undertaken pursuant to the performance of their duties and (2) within the scope of their authority. *Id.* (citations and quotations omitted). After this initial step has been established, the plaintiff must show that the defendants violated the plaintiff's clearly established statutory or constitutional rights. *Id.* For the law to be clearly established, "the law must have earlier been developed in such a concrete and factually defined context to make it

obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Lassiter v. Alabama A & M University, Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir.1994) (quotations omitted). This doctrine focuses on "the actual, on the specific, on the details of concrete cases." *Id.*

The parties do not dispute that the actions of Defendants Lynette Conner, Lynne Turner, Lisa Davis, Lee Reddish, and Sandra Rogers occurred within the scope of each defendant's individual discretionary authority. The only acts which the plaintiff contests as being outside the defendants' authority are the defendants Stines[2] and Ricks, when they "tampered" with the grand jury. Once the defendants properly raise their qualified immunity defense, plaintiffs bear the burden of showing that the federal rights allegedly violated were clearly established. *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996). Therefore, the next step is for the plaintiff to demonstrate that the defendants' actions violated clearly established law. The plaintiff has claimed three federal constitutional violations: malicious prosecution; due process; and conspiracy to violate one's constitutional rights. Each claim will be addressed in turn.

1. Malicious Prosecution

First, the plaintiff asserts the defendants' conduct supports a cognizable action for malicious prosecution under section 1983. The Eleventh Circuit has unequivocally

2. Because Stines has been dismissed based on his prosecutorial immunity, the Court need only address Defendant Ricks as to this allegation.

identified malicious prosecution to be a constitutional tort that is cognizable under 42 U.S.C. §1983, observing, "[l]abeling . . . a section 1983 claim as one for a 'malicious prosecution' can be a shorthand way of describing a kind of legitimate section 1983 claim; the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead." *Uboh v. Reno*, 141 F.3d 1000, 1002-03 (11th Cir. 1998) (citations omitted). *See also Whiting v. Traylor*, 85 F.3d 581, 584, n.4 (11th Cir. 1996) (holding the "federal 'right' to be free from malicious prosecution is actually a description of the right to be free from an unlawful seizure which is part of a prosecution.") As the plaintiff points to the record, which shows he was arrested and released on a $60,000 surety bond, Lamon has a cognizable federal claim. Lamon depo. at p.276.

In a malicious prosecution case, federal courts look to state law for guidance as to the constituent elements of the claim. *Uboh*, 141 F.3d at 1004; *Kelly v. Serna*, 87 F.3d 1235 (11th Cir. 1996). O.C.G.A. §51-7-40 provides, "A criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action." The elements of a malicious prosecution claim under Georgia law consists of: "(1) prosecution for a criminal offense; (2) instigated without probable cause; (3) with malice; (4) under a valid warrant, accusation or summons; (5) which is terminated favorably to the plaintiff; and which (6) has caused damage to the plaintiff." *Kelly v. Serna*, 87 F.3d 1235, 1240-41 (11th Cir. 1996) (citations omitted). If some slight circumstances

point to the defendant's guilt, even if it is not enough to exclude every other reasonable hypothesis, there is no claim for malicious prosecution. *Id.* "What facts and circumstances amount to probable cause is purely a question of law, and even assuming a jury question was presented on the issue of probable cause, [the defendant was] also required to produce evidence of malice." *Id.*

The defendants point to the grand jury's indictment, specifically raising the fact that Lamon was not arrested nor was any action taken against him until the grand jury voted to "true bill." If a grand jury indicts, this constitutes prima facie evidence that probable cause existed for the prosecution. *Agbonghae v. Circuit City Stores, Inc.*, 214 Ga. App. 561, 448 S.E.2d 484, 486 (Ga. App. 1994). At such point, the burden shifts to the plaintiff, who then "must come forward with specific facts tending to show that probable cause did not exist for his arrest and that the charges against him were instead motivated by malice." *Id.* A grand jury indictment, however, will not lead to such a decision if a defendant committed misconduct in attempting to influence the grand jury's decision, even if the decision to prosecute lay strictly with the prosecutor. *Eubanks v. Gerwen*, 40 F.3d 1157, 1160 (11th Cir. 1994). If the defendants concealed facts or misrepresented highly material facts or defrauded either the prosecutor or the grand jury, then the defendants may be liable for this conduct *See, e.g., Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (holding that defendants cannot escape liability by pointing to the grand jurors if they defrauded officials in the prosecution.) As long as a defendant did not make the decision to prosecute nor act in such a way as improperly to influence the decision by

the prosecutor or the grand jury, then that defendant is entitled to summary judgment as a matter of law. *Eubanks*, 40 F.3d at 1160.

The plaintiff asserts that there is a factual question as to whether the defendants ignored and suppressed exculpatory evidence which would negate any probable cause. In support, he contends that the defendants were aware that Britt's testimony was unreliable by virtue of the following facts: (1) Britt's charges against her father were made at a time when Britt was hospitalized for mental problems; (2) Britt had also made unsubstantiated allegations that she had been shot at ten times; and (3) the medical record affirmatively showed her to be a virgin when she alleges to have been molested. However, simply because a witness' testimony may not be found to be credible is not sufficient to defeat a qualified immunity defense, absent evidence that the officers intentionally submitted testimony they *knew* to be false or intentionally concealed material defects in the case. *Williams v. City of Albany*, 936 F.2d 1256, 1260 (11th Cir. 1991). It is for the grand jury to weigh credibility when it determines if probable cause exists. *Id.* Although the defendants recognized that the victim witness' testimony may not be believed by the grand jury, their recognition as such does not amount to a showing that the defendants knew Britt's testimony was false.

Lamon also asserts that both Stines and Turner told Britt to keep with her story. According to Britt's affidavit, submitted by the plaintiff, during the meetings preparing for trial, Stines told Britt to "go through with her story," regardless of whether it was true or not. Britt Aff. at ¶10.

Britt states that Turner also made a similar statement while taking Britt home from a meeting with Stines. However, such meetings with Stines and Turner occurred after the grand jury indicted Lamon. *See* Britt Aff. at ¶9, 10 (asserting the two meetings she had with Stines were to prepare her for her trial testimony). Accordingly, this does not affect significance of the grand jury's indictment.

The plaintiff has not met his burden to set forth specific facts which show that any of the other defendants, except the prosecutor, made any part of the decision to prosecute Lamon or otherwise improperly influenced the grand jury or the prosecutor. The plaintiff has not asserted that the remaining defendants concealed any facts from the prosecutor or committed any actions themselves which would support this claim. Moreover, the prosecutor has admitted that he knew about the problems with Britt's credibility, and did not want to indict Lamon without the grand jury because the case revolved around Britt's credibility. Stines Depo. at 17-24. Finally, Lamon's assertion that the defendants encouraged Britt to keep the same story occurred after the grand jury indictment, and therefore does not negate the prima facie evidence of probable cause evidenced by the grand jury's indictment.

The plaintiff challenges whether Defendant Ricks[3] is entitled to qualified immunity, asserting that "tampering" with the grand jury is outside the scope of his duties. According to the plaintiff's assertions, Stines contacted the

3. Although Lamon accuses both Stines and Ricks of misconduct in this incident, Stines has been dismissed because of prosecutorial immunity.

sheriff to notify him that Stines had reason to believe that Debra Lamon was attempting to harass and influence the potential witnesses who would be appearing before the grand jury. Stines depo. at 100. Ricks, the GBI agent, came to see Stines regarding these allegations. *Id.* at 101. Stines told Ricks he needed to check into the matter. *Id.* at 102. Ricks thought that one of the grand jurors may have been contacted, so he called 20 out of the 23 grand jurors and asked them if they had been contacted about any of the pending cases before the grand jury. Stines. Depo. at 104; Ricks depo. at 88-93. On the following Monday morning, the grand jury convened and Ricks identified himself as an agent of the GBI and testified on the presentation of the indictment against Lamon. Ricks depo. at 86.

Even assuming the defendant did not have qualified immunity for such function, the Court finds no basis to support the violation of any constitutional right at all. The only federal constitutional claim which would apply to this act is malicious prosecution under the Fourth Amendment. However, the above mentioned conduct taken together does not demonstrate the required element of malice, nor does the plaintiff even assert Ricks acted with malice. Furthermore, the Court can find no harm committed in relation to its effect on the grand jury. Lamon does not assert that Ricks asked any other question, identified which case that was before the grand jury had potential problems, or who otherwise attempted to influence the jurors. Instead, Lamon asserts that the grand jury would have assumed it was his case and would have assumed he must have been the person attempting to contact grand jury members. Such conclusions are based on pure speculation. In summary, the

plaintiff has provided no rational basis as to how these actions would violate his federal constitutional rights, nor can the Court discern how such acts violated any right. At the most, the acts appear to be an error, performed without malice.

Accordingly, the Court finds the plaintiff has not met his burden in showing the remaining defendants acts violated Lamon's Fourth Amendment rights.[4]

2. Due Process Claim

The plaintiff asserts the defendants violated his constitutional right to due process by fraudulently procuring custody of Lamon's daughter. The Fourteenth Amendment's protection of due process can consist of a substantive and a procedural due process claim.

Substantive due process prohibits the government from engaging in certain activity regardless of the procedure used to implement that activity. *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990). As the government may intervene in a family relationship to protect a child when it follows the proper procedure upon appropriate facts, there is no substantive due process claim. *Id.* However, if the government did not proceed through proper procedures upon

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4. Moreover, the Court notes that under Georgia law, the denial of a motion for a directed verdict of acquittal constitutes a binding determination of the existence of probable cause. *K-Mart Corp. v. Coker*, 410 S.E.2d 425, 427, 261 Ga. 745, 746 (Ga. 1991); *Remeneski v. Klinakis*, 222 Ga. App. 12, 14, 473 S.E.2d 223, 226 (Ga. App. 1996). A motion for directed verdict was made and denied during Lamon's criminal trial. Crim. Tr. at 2281-84.

appropriate facts, the plaintiff may have a procedural due process claim.

Lamon argues that the defendants violated his procedural due process rights because they did not possess reliable evidence that the plaintiff's daughter was in danger because of the plaintiff's custody over her and employed fraudulent means to retain custody over her. Lamon does not point to any specific acts which would support this allegation. Moreover, the record refutes any alleged wrongdoing. Britt herself had accused her father of molesting her as a child. To even suggest that the state child protection service agency cannot act when the child herself alleges such serious allegations is unreasonable and inconsistent with the duties of the agency. Furthermore, on July 13, 1993, the plaintiff himself moved, through his attorney, to have his daughter placed in the custody of DFACS. *See* Defs.' Br. Supp. Summ. J., Ex. A (Lamon's Motion to the Court). A hearing was held regarding this matter. *Id.*, Ex. B (Transcript of the Hearing). Further, Lamon consented on December 21, 1993, to allow the DFACS to have legal custody over Britt. Lamon depo. at 167-171. The Court finds no basis in the allegations that Lamon's due process rights were violated as such occurred after the proper procedures were followed and Lamon himself consented.

3. Conspiracy

As the Court has found no merit in Lamon's constitutional claims, any assertion that the defendants conspired to violate his constitutional claims also fails.

Appendix B

D. State law Claims Barred

The defendants assert that the state claims must be dismissed because the Court lacks jurisdiction over them. As the state tort claims arose after January 1, 1991, the plaintiff was required to bring such claims pursuant to the Georgia Tort Claims Act ("GTCA"), which is the exclusive remedy for any tort action against the State. The defendants allege that the plaintiff never gave written notice of these claims within twelve months of the date that this cause of action arose as required by GTCA. *See* O.C.G.A. §50-21-26(a)(1) and (2).

A tort claim may not be brought against the state "without first giving notice of the claim." O.C.G.A. §50-21-26(a). A court has no jurisdiction to review the plaintiff's claims under GTCA "unless and until a written notice of claim has been timely presented to the state as provided in this subsection." O.C.G.A. §50-21-26(a). Therefore, if the claims fall under the GTCA and timely notice was not given to State, this Court must dismiss such claims.

The plaintiff does not dispute the defendants' contention that notice was not given to the proper parties, but instead contends that, as he is suing an officer or employee of the state and not the state itself, the action is not subject to the notice requirement. However, a plaintiff may not escape the ante litem notice by suing state officers and employees in their individual capacity instead of the official capacity. *Howard v. Miller*, 476 S.E.2d 636, 639, 222 Ga. App. 868, 871 (Ga. App. 1996). The State Tort Claims Act "constitutes

the exclusive remedy for any tort committed by a state officer or employee. A state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor." O.C.G.A. §50-21-25(a). If a plaintiff names an officer or employee in their individual capacity for which the state is liable, the state must be substituted as the party defendant. O.C.G.A. §50-21-25(b). Hence, the issue is whether the complained of acts occurred while the defendants were "acting within the scope" of their respective individual employment.

The plaintiff asserts that the actions he complains of were not taken within the employee's scope of his or her official duties or employment because GTCA does not cover intentional and malicious acts. However, the plaintiff provides no support for this contention. The cases which supposedly support this statement do not apply GTCA. In *Christensen v. State*, 464 S.E.2d 14, 18, 219 Ga. App. 10, 13 (Ga. App., 1995), the court found the GTCA inapplicable because the action complained of occurred before the Georgia Tort Claims Act was enacted; hence the court based its decision upon the provisions of the Georgia Constitution in force at that time and prior to the 1990 amendment to Art. I, Sec. II, Par. IX to Georgia's Constitution. In *Gilbert v. Richardson*, 452 S.E.2d 476, 264 Ga. 744 (Ga. 1994), GTCA did not apply because the "tort claims act specifically excludes counties from the list of entities to which the waiver applies."

The Court does not find GTCA as limiting as the plaintiff contends, which would preclude any intentional or malicious

act. Georgia courts have consistently held that intentional torts, such as false imprisonment and assault and battery, are still covered under GTCA In *Mattox v. Bailey*, 221 Ga. App. 546, 546, 472 S.E.2d 130 (Ga. App. 1996), the plaintiff alleged that a correctional officer slammed the plaintiff's head into a door and beat him while escorting the plaintiff across prison grounds. The court granted the defendant's motion to dismiss because the acts occurred in the performance of the defendant's official duties as a correctional officer and thus was immune from suit under GTCA. *Id.* Immunity under GTCA is even more extensive than the qualified immunity doctrine of 42 U.S.C. §1983. *Id.* (holding that while the alleged acts fell within the perimeter of GTCA, the defendant was not necessarily entitled to qualified immunity).

As to the element of maliciousness that the plaintiff asserts, the Court is at a loss to find any authority which holds that GTCA does not apply simply because a state official conducted his duties maliciously. Moreover, "the Act does not require that acts of state officials or employees be made in 'good faith' in order to trigger the Act's protection." *Datz v. Brinson*, 430 S.E.2d 823, 824, 208 Ga. App. 455, 456 (Ga. App. 1993). So long as the alleged acts occurred within the scope of the officials' or employees' employment, the defendants are immune from suit. *Id.* Merely because the plaintiff alleged that the defendants acted maliciously does not prevent this action from proceeding under GTCA. Alternatively, the Court finds no evidence as to the actual malice that was previously required, should the same standard still apply. The plaintiff has failed to point to any evidence which would put such a contention at issue.

Appendix B

In reviewing whether the acts occurred in the scope of the each defendant's individual employment, the plaintiff acknowledges that, except for the alleged jury tampering issue, all acts complained of are "within the scope of the individual defendants' respective discretionary authority." Such acts would therefore be governed by the GTCA. The plaintiff also asserts that the defendants should be liable because of actions they did not take, specifically that they did not perform enough investigation before prosecuting the underlying action. However, the GTCA provides that employees shall not be subject to lawsuit arising from the nonperformance of their official duties. O.C.G.A. §50-21-21. Therefore, any nonperformance of their duties also is covered by the GTCA. Because the actions and inactions alleged in the complaint are included under GTCA, the plaintiff is required to properly notice the state before proceeding to court. As the plaintiff has failed to demonstrate his compliance with the GTCA, the Court has no jurisdiction to resolve such claims.

Finally, as to the jury tampering issue, see discussion *supra*, page 13, even assuming this was outside of Ricks's scope of official duties, the Court is at a loss as to how this action by Defendant Ricks states a claim under the plaintiff's theories resting on state law torts, either the malicious prosecution claim or the intentional infliction of emotional distress claim. Nor does the plaintiff address this issue. Accordingly, the Court finds the plaintiff's claims under state law are denied because the plaintiff failed to supply notice as required by the GTCA and the remaining acts which were outside any official duties do not, in themselves, support the plaintiff's causes of action.

Appendix B

CONCLUSION

Therefore, based on the above mentioned reasons, Defendants' Motion for Summary Judgment (Doc. No. 39) is hereby **GRANTED**. The Court **DIRECTS** the Clerk of the Court to **ENTER JUDGMENT** in favor of **DEFENDANTS**.

SO ORDERED, this 31st day of March, 1999.

s/ W. Louis Sands
W. LOUIS SANDS
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION FILE NO.
6:95-cv-28(WLS)

JAMES CLYDE LAMON,

Plaintiff,

vs.

LYNETTE CONNER, LYNNE TURNER, LISA DAVIS, LEE REDDISH, SANDRA ROGERS, ED RICKS, CHARLES STINES, COLQUITT COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES,

Defendants.

JUDGMENT

Pursuant to the Order of the Court dated and filed March 31, 1999, and for the reasons contained therein, Defendants' Motion for Summary Judgment is hereby GRANTED, and Judgment is entered accordingly.

This 31st day of March, 1999.

GREGORY J. LEONARD,
CLERK

BY: s/ Gina S. Paulk
Deputy Clerk

APPENDIX C — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SEVENTH AMENDMENT

In Suits in common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

* * *

FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983

Every Person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * * *

(2)

No. 00-0146

Supreme Court, U.S.
FILED
AUG 23 2000
CLERK

In The

Supreme Court of the United States

JAMES CLYDE LAMON,

Petitioner,

v.

LYNETTE CONNER, LYNNE TURNER, LISA DAVIS, LEE REDDISH, SANDRA ROGERS, ED RICKS, CHARLES STINES, COLQUITT COUNTY DEPARTMENT OF FAMILY & CHILDREN SERVICES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts correctly applied a properly stated rule of law to the facts of this case so that state officials are entitled to qualified immunity for their participation in a child abuse investigation only after Petitioner sought, received and consented to a court order giving the state custody of the daughter making abuse allegations against him?

2. Whether the lower courts correctly applied a properly stated rule of law to the facts of this case so that an assistant district attorney is entitled to absolute prosecutorial immunity from trial when he presented the case to a grand jury and prosecuted Petitioner only after the grand jury's indictment?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner James Clyde Lamon seeks a writ of certiorari to review the Eleventh Circuit Court of Appeal's affirmance of a grant of summary judgment to Respondents by the District Court for the Middle District of Georgia. Respondents Lynette Conner, Lynne Turner, Lisa Davis, Lee Reddish and Sandra Rogers are employees of the Colquitt County Department of Family and Children Services [DFACS], a subdivision of the Georgia Department of Human Resources [DHR]. Respondent Ed Ricks is an agent with the Georgia Bureau of Investigation [GBI]. Respondent Charles Stines is an Assistant District Attorney for the Southern Judicial Circuit in Moultrie, Georgia.

Petitioner's claims arose out of his daughter's allegations of sexual abuse by him. Respondents conducted an investigation of those allegations and Petitioner was indicted by a duly constituted grand jury of Colquitt County, Georgia. After a jury trial on charges of child molestation and aggravated sodomy, Petitioner was acquitted on January 6, 1995.

Petitioner's Complaint contained two claims under 42 U.S.C. § 1983, one for conspiracy and one for violation of his rights to due process and a fair trial; it also contained five state law claims: malicious prosecution, intentional infliction of emotional distress, seduction, fraudulent interference with custody and abuse of custody.

After extensive discovery, Respondents filed a motion for summary judgment pursuant to FED. R. CIV. P. 56 on August 28, 1996, which was granted by the District Court on March 31, 1999. [Pet., App. B]. The District Court granted summary judgment to DFACS and the individual defendants in their official capacity on the basis of the Eleventh Amendment. [Pet., App. 8a] It accorded summary judgment to Assistant District Attorney Stines because there was no evidence that he had performed any acts outside the protection of absolute prosecutorial immunity. [Pet., App. 10a]. Qualified immunity was granted to the remaining Respondents, who are all members of the executive branch of state government. The District Court carefully examined the facts of the case and held that Petitioner had not adduced any evidence that Respondents had violated his rights under either malicious prosecution or due process precepts. [Pet., App. 19a, 20]. Finally, the Court ruled that the state law claims were barred for lack of a requisite *ante litem* notice. [Pet., App. 24a].[1]

Petitioner took an appeal to the United States Court of Appeals for the Eleventh Circuit, which reviewed the record, found no merit in Petitioner's arguments, and concluded that the District Court was correct to grant summary judgment in favor of Respondents. [Pet., App. 2a].

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[1] Although Petitioner purports to appeal the dismissal of his state law claims [Pet., 1], there is no federal question presented for review in this issue.

B. Corrections to Petitioner's Statement of Facts

Given this Court's admonition that counsel for Respondents "have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement in the petition" [Sup. Ct. R. 15], Respondents show that they had to file an unusual motion in the Court of Appeals to strike portions of Petitioner's brief as being violative of F.R.A.P. 28 and Eleventh Circuit Rules 28-4, 28-1(i) and 30-1 because he included in his record appendix and discussed in his brief voluminous documents which were never in the District Court record. [Resp. App. A]. The Court of Appeals granted that motion and directed Petitioner to correct and refile his brief and record. [Resp. App. B]. Nevertheless, Petitioner has continued to perpetuate many of his errors, omissions and misstatements of fact in the Petition herein; for example, he continues to insist his daughter was a virgin, but neglects to inform the Court that the same doctor testified her injuries were consistent with sexual abuse. Rather than attempt further point-by-point refutation, Respondents set out a correct recitation of the facts below.

Katherine Britt Lamon [Britt] is the daughter of Petitioner and his ex-wife. When Britt was fifteen years old and living with her mother in Florida, a fight between the two resulted in Britt being taken into police custody and eventually transferred to a psychiatric facility. While in the hospital, Britt alleged that Petitioner had sexually molested her for several years when she was younger. The Florida authorities interviewed Britt, found her allegations credible, and reported them to Respondent

Reddish, a DFACS child protective services [CPS] investigator in Colquitt County, Georgia, the county where the alleged abuse had taken place.

Once the Florida social service officials discovered that Petitioner was Britt's custodial parent, efforts were made to get him to pick up his daughter in Florida; however, Petitioner contacted Respondent Rogers and requested that DFACS pick her up instead. Respondent Rogers advised Petitioner that DFACS could not pick Britt up without having legal custody of her, so upon motion by Petitioner and his attorney, temporary custody of Britt was given to DFACS by the Superior Court of Colquitt County. Respondents Rogers and Davis then picked Britt up and placed her in foster care.

Although aware of DFACS' plans for Britt's care, Petitioner never complained to the Superior or Juvenile Court in writing about DFACS having temporary custody of his daughter or about her care while in custody. Petitioner filed the motion to transfer temporary custody to DFACS and never sought to revoke that order. In November 1993, at the hearing to appoint a guardian ad-litem, Petitioner's original attorney stated on behalf of Petitioner that a guardian should not be appointed because "we think that the Department is adequately doing a good job of representing Britt's interest and there is no conflict there." [Pet., App. 5a]. Petitioner was present and testified at that hearing. In December 1993, Petitioner consented to legal custody being placed with DFACS.

Once the allegations of abuse were confirmed by DFACS' investigation, the results were forwarded to Respondent Charles Stines, an Assistant District Attorney

for the Southern Judicial Circuit, in conformance with O.C.G.A. § 19-7-5(e). Respondent Ricks of the GBI was assigned by his supervisors to investigate this matter for the purpose of pursuing a criminal prosecution. In addition to reviewing the investigatory file, Respondent Ricks conducted his own interview of Britt and other parties. Respondent Stines, upon reviewing the entire investigation and meeting with Britt personally, believed she was credible and decided to prosecute the case; none of the other Respondents in this action participated in the decision to prosecute. The case was presented to the grand jury, which indicted Petitioner on charges of child molestation and aggravated sodomy. Petitioner was tried to a jury and acquitted on January 6, 1995.

During and after her father's trial, Britt's behavior changed for the worse. Because Britt became unmanageable, DFACS filed a petition with the Juvenile Court of Colquitt County to revert custody back to Petitioner. Shortly after the petition was granted, this lawsuit was filed.

ARGUMENT

I. THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY APPLIED ADMITTEDLY CONSTITUTIONAL RULES OF LAW – PROVIDING THAT STATE EMPLOYEES MAY BE ENTITLED TO IMMUNITY FROM TRIAL – TO THE FACTS OF THIS CASE

Certiorari should be denied in this case because it merely involves asserted errors which consist of "erroneous factual findings or the misapplication of a properly stated rule of law." (Sup. Ct. R. 10). Petitioner does not

challenge the constitutionality of the rule of law in this case that "qualified immunity protects government officials performing discretionary functions from civil trials (and from the other burdens of litigation, including discovery) and from liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court has recently reiterated that "[w]hat this means in practice is that whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (internal quotations omitted). "Clearly established" for purposes of qualified immunity means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Contrary to the hyperbolic and unsubstantiated allegations throughout the Petition that there are no civil rights in Georgia [*see, e.g.*, Pet., 6-9, 11, 17], these principles continue to be the guidelines adhered to in qualified immunity cases in the Eleventh Circuit. *See Jenkins v. Talledega City Board of Educ.*, 115 F.3d 821, 323 (11th Cir. 1997) (*en banc*); *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (*en banc*). Indeed, this is precisely the rule followed by the District Court and affirmed by the Court of Appeals. [Pet., App. 2a, 11-12a]. Thus, no question is presented for certiorari. [Supreme Ct. R. 10].

Nevertheless, Petitioner makes many erroneous claims in his efforts to persuade this Court to grant certiorari. First, he states that the lower courts have somehow erred by following what he calls "job description" immunity [Pet., App. 11-13a]. Such an assertion bespeaks a misunderstanding of *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1282 (11th Cir. 1998), which provides that "[t]o establish that the challenged actions were within the scope of his discretionary authority, a Defendant must show that those actions were (1) undertaken pursuant to the performance of his duties, and (2) within the scope of his authority." Petitioner apparently does not understand that this is merely a threshold test for the *Harlow* requirement that the official be acting pursuant to "discretionary authority"; it is not an ultimate determinate of the immunity issue itself. Once the "discretionary authority" question is resolved, courts still have to determine whether a constitutional right has been stated and whether it was clearly established. *Harbert, supra*, at 1284. This approach clearly comports with this Court's instruction that, in reviewing an assertion of entitlement to qualified immunity, courts "must first determine whether the Petitioner has alleged the deprivation of an actual constitutional right at all, and, if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert*, 516 U.S. 286, 290 (1999).

Following these principles, the District Court held, and the Court of Appeals affirmed, that Respondents were entitled to qualified immunity on both the malicious prosecution and due process claims. [Pet., App. 19a, 20a]. With regard to the due process issue, it is well settled

that, although Petitioner may initially have had a liberty interest in his parent-child-family relationship, "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603 (1979); *see also Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Recognizing that "[s]ince the government may intervene in the family relationship when following proper procedures upon appropriate fact, [a parent] has no constitutional right which can survive procedural due process," *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990) (bracketed matter supplied), the District Court properly held that Petitioner did not have a substantive due process cause of action and analyzed his claims under settled procedural due process guidelines of this Court. [Pet., App. 19a-20a].

Those guidelines establish that, although procedural due process is a guarantee of fair procedures whereby the state may not deprive a person of liberty or property without providing "appropriate procedural safeguards," *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring), a procedural due process violation is not complete "unless and until the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 123 (1990). As the District Court recognized, no such deprivation occurred in this case; Petitioner clearly had the full panoply of procedural protections in both the juvenile court hearings and his criminal trial in superior court.[2] [Pet.,

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[2] Moreover, Petitioner could not state a procedural due process cause of action under *Parratt v. Taylor*, 451 U.S. 527

App. 20a]. Thus, since Petitioner failed to state a cause of action for a procedural due process claim under § 1983, Respondents are entitled to qualified immunity from trial, and there is no cert-worthy due process issue here. *Conn v. Gabbert, supra.*

Addressing the malicious prosecution claim, the District Court also followed well-established rules, which Petitioner does not challenge, by which courts "historically have looked to traditional doctrines of tort liability under state law for guidance as to the elements of a malicious prosecution claim." *Uboh v. Reno*, 141 F.3d 1000, 1004 (11th Cir. 1998). State and federal guidelines both provide that the existence of a grand jury indictment is *prima facie* evidence that probable cause existed for a defendant's prosecution. *L.S.T., Inc. v. Crow*, 49 F.3d 679 (11th Cir. 1995); *Marx v. Gumbinner*, 905 F.2d 1503, 1505-06 (11th Cir. 1990); *Agbonghae v. Circuit City Stores, Inc.*, 214 Ga.App. 561, 448 S.E.2d 484, 486 (1996). Thus, the intervening acts of the district attorney and the grand jury in this case broke any even remotely arguable chain of causation between the DFACS and GBI Respondents and Petitioner's indictment. Moreover, even absent indictment, "law enforcement officials who reasonably but mistakenly conclude that probable cause is present" are

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(1981) and its progeny, which provide that "a statutory provision for a post-deprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." *Zinermon, supra*, at 128. The fact that Petitioner herein had an opportunity to pursue his damage action under the Georgia Tort Claims Act demonstrates conclusively that his state remedies are adequate. O.C.G.A. § 50-21-20 *et seq.*; *Rittenhouse v. DeKalb County*, 764 F.2d 1451, 1459 (11th Cir. 1985).

entitled to qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The District Court carefully examined the record and found that Petitioner had "not met his burden to set forth specific facts which show that any of the other defendants, except the prosecutor, made any part of the decision to prosecute Lamon or otherwise improperly influenced the grand jury or the prosecutor." [Pet., App. 17a] Nor had Petitioner "asserted that the remaining defendants concealed any facts from the prosecutor or committed any actions themselves which would support his claim." [*Id.*].

As with his statement of facts, however, Petitioner egregiously misstates the lower courts' opinions by claiming that they have granted Respondents "blanket" – presumably absolute – immunity. [Pet., 16, 20, 27]. Nothing could be further from the truth: the only Respondent granted absolute immunity, and properly so, was Respondent Stines, Assistant District Attorney for the Southern Judicial, who alone made the decision to prosecute Petitioner, and who has immunity from trial in this case on the basis of *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (in initiating prosecution and presenting State's case, prosecutors are immune from civil damage actions) and its progeny. [Pet., App. 11a]. Petitioner does not raise a credible claim that the lower courts' rulings on this issue conflict with a *specific* decision of this Court. [Pet., 12].

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather

than the other, though fair-minded judges could find it tilting either way." *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951). Because the asserted errors herein consist merely of "erroneous factual findings or the misapplication of a properly stated rule of law," and because the lower courts properly applied correct rules of immunity law, Petitioner does not present any "compelling reasons" which would warrant the grant of a writ of certiorari. (Sup. Ct. R. 10).

II. THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' OPINION DOES NOT CREATE A CONFLICT BETWEEN THE CIRCUITS

Petitioner discusses six cases from other federal circuits and claims that, in those cases, plaintiffs were properly granted trials, whereas here, he was unjustly deprived of a trial. These claims are totally without merit and present no basis for a grant of certiorari.[3] A reading of those six cases reveals that they are all distinguishable from the case at bar: First, in *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 201 (6th Cir. 1987) [Pet. 22], the Court ruled that a social worker violated a parent's substantive due process rights when she went out of state to take children into custody without proper authority. In stark contrast, the DFACS caseworkers herein were asked by Petitioner himself to bring his daughter back to Georgia, but they did not do so until Plaintiff filed a motion in

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[3] Nor do the voluminous string cites in various footnotes throughout the Petition even set forth accurate parenthetical analyses, much less serious bases for a grant of certiorari. [See, Pet., 6-12 n. 5-7].

Juvenile Court, which placed custody in DFACS. [Pet., App. 20a].

The second case cited by Petitioner, *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990) [Pet., 23] is also inapposite because it denied qualified immunity to officials who conducted an unconstitutional entry and search of a private home. There were no allegations of an unreasonable search in this case. Similarly, *Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988) [Pet., 23] is distinguishable because it denied qualified immunity to police officers for an unconstitutional warrantless arrest; whereas here, Petitioner did not turn himself in for arrest until after indictment by a grand jury. [Pet., App. 15a].

Petitioner's quotation from *Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999) [Pet. 24] is but *dicta*, since the court's actual holding was that the plaintiff parents did *not* state a violation of their constitutional rights and that it was objectively reasonable for the defendants to conduct the child abuse investigation as they did. 182 F.3d at 108-109. Likewise, *Malik v. Arapahoe County Dept. of Social Serv.*, 191 F.3d 1306 (10th Cir. 1999) [Pet., 24] dealt with a denial of immunity to a social worker who sought and received an *ex parte* telephone order from a magistrate authorizing her to take plaintiff's children into custody; here, of course, Petitioner himself sought and obtained a written Juvenile Court order authorizing Respondents to care for his daughter. [Pet., App. 20a]. Finally, in *Wallis v. Spencer*, 193 F.3d 1054 (9th Cir. 1999) [Pet., 25 (incorrectly cited)], plaintiff's children were taken into custody without any court order at all; again, no bearing on the present case. None of these six cases – nor, indeed, none

of the multitude of cases string-cited in footnotes – provides "even scant metaphysical support" for Petitioner's argument that the lower courts erred in this case or that citizens of Georgia and the Eleventh Circuit are bereft of fundamental rights. *Conn v. Gabbert, supra.*

Consequently, certiorari should not be granted in this case because it is not one "involving principles the settlement of which is of importance to the public as distinguished from that of the parties, . . . [or] where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *NLRB v. Pittsburgh Steamship Co., supra,* at 502.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE No. 99-10815-D

JAMES CLYDE LAMON,

Plaintiff/Appellant,

v.

LYNETTE CONNER, et al.,

Defendants/Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia
Civil Action No. 95-CV-28 (WLS)

APPELLEES' MOTION TO STRIKE

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LAMON V. CONNER

Case No. 99-10815-D

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Charles Stines, Defendant/Appellee

Lynne Turner, Defendant/Appellee

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES CLYDE LAMON,

Plaintiff/Appellant,

v.

LYNETTE CONNER, *et al.*,

Defendants/Appellees.

CASE No.
99-10815-D

APPELLEES' MOTION TO STRIKE

COME NOW Defendants/Appellees Lynette Conner, Lynne Turner, Lisa Davis, Lee Reddish, Sandra Rogers, Ed Ricks, Charles Stines and the Colquitt County Department of Family and Children Servicers [DFACS], a subdivision of the Georgia Department of Human Resources [DHR] [hereinafter "Defendants"] and move the Court pursuant to F.R.A.P. 28(a) to strike those portions of Appellant's Brief which refer to documents which were not part of the District Court record. In support of this motion, Defendants show the Court as follows:

1.

This is an appeal by Plaintiff/Appellant [hereinafter "Plaintiff"] from an order of the District Court for the Middle District of Georgia granting Defendants' motion for summary judgment. The underlying action is one for damages pursuant to 42 U.S.C. § 1983 and state law in which Plaintiff claims that Defendants violated his constitutional and state rights during their investigation of his daughter's allegations of sexual abuse by him.

2.

Defendants Lynette Conner, Lynne Turner, Lisa Davis, Lee Reddish and Sandra Rogers are employees of the Colquitt County Department of Family and Children Services [DFACS], a subdivision of the Georgia Department of Human Resources [DHR]. Defendant Ed Ricks is an agent with the Georgia Bureau of Investigation [GBI]. Defendant Charles Stines is an Assistant District Attorney for the Southern Judicial Circuit in Moultrie, Georgia.

3.

Plaintiff was indicated by a duly constituted and composed Grand Jury of Colquitt County, Georgia, on charges of child molestation and aggravated sodomy, but was acquitted after a jury trial. Plaintiff alleges in this action that Defendants conspired to take custody of his daughter without due process and to maliciously prosecute him.

4.

Plaintiff served the Brief of Appellant on September 8, 1999, accompanied by eight (8) volumes of "record" excerpts which violate 11th Cir. Rule 30-1 in that they contain far more than the documents specified in that rule. More importantly, Plaintiff's "record" excerpts contain documents which were never part of the District Court record. Those documents are as follows: Katherine Britt Lamon's School Record (Plaintiff's Tab 6); Katherine Britt Lamon's Medical Record (Plaintiff's Tab 7); Katherine Britt Lamon's St. Johns' River Hospital Records (Tab 8); Katherine Britt Lamon's Florida State Delinquency Materials (Tab 9); DFACS Colquitt County Protocol (Tab 10); *State v. Lamon* Pre-Trial Motion Transcript 5/31/94 (Tab 12); *State v. Lamon* Pre-Trial Motion Transcript 10/3/94 (Tab 13); Statement of James Clyde Lamon in *Lamon v. Schwarz* (Tab 20); and Statement of Katherine Britt Lamon in *Lamon v. Schwarz* (Tab 21).

5.

F.R.A.P. 28(a) (7) requires appellants to include in their brief "a statement of facts relevant to the issues submitted for review with appropriate references *to the record*." (emphasis supplied). In addition, an appellant's argument section must also contain citations to the record. F.R.A.P. 28(a) (8). Plaintiff makes numerous references to those documents which were never part of the District court record in both the statement of facts and argument sections of his brief. In the table of contents to his "record" excerpts, Plaintiff groups these documents under a "R.30-1(k)" heading. However, 11th Cir. R. 30-1

also requires that the "relevant documents" under subpart (k) must be a "portion[] of the *district court . . . record.*" (emphasis supplied).

6.

This Court has indicated that the proper method for assuring that such non-record "evidence" will not be improperly relied upon is to make a motion to strike those portions of Plaintiff's brief which refer to such "evidence." *Riley v. City of Montgomery, Ala.*, 104 F.3d 1247, 1251 n.4 (11th Cir. 1997); *Diversified Numismatics v. City of Orlando, Fla.*, 949 F.2d 382, 384 (11th Cir. 1991) ("Appellants should not have referenced material not in the record, and we will not consider any non-record evidence or arguments based upon non-record evidence."). *See, also, Newhouse v. McCormick*, 130 F.3d 302, 304 (8th Cir. 1997) (approving earlier grant of motion to strike portion of appellant's brief for failure to conform to FRAP 28(c)); *Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1392 n.4 (7th Cir. 1990) (granting motion to strike portions of appellate brief where party, in referring to matters never entered into record as evidence, was "impermissibly attempting to build a new record on appeal").

7.

Additionally, Plaintiff's brief violates two other rules of this Court: 11th Cir. R. 28-4, which requires that "[r]eferences to the record in a brief shall be to volume number (if available), document number, and page number; and 11th Cir. R. 28-1(i), in that its statement of

the case does not cite the "volume, document number and page number of the *original record* where the matter relied upon is to be found." (emphasis supplied). Instead of conforming to these rules of this Court, Plaintiff cites to voluminous documents which he has filed as purported "record" excerpts but which, as shown above, contain several documents which were not part of the record below. Moreover, Plaintiff has numbered these documents in a manner which does not conform to the document numbers on the District Court docket sheet, which is supposed to form the basis for citations to the record by the parties. Naturally, Plaintiff's failure to conform to these rules has increased the difficulty, time and effort required by counsel for Appellant/Defendants to prepare their responsive brief, and presents yet another reason supporting their motion to strike all of those portions to the Brief of Appellant containing incorrect or invalid record references.

8.

The rules of this Court provide that counsel should prepare a "proper" statement of facts which "reflects a high standard of professionalism." 11th Cir. R. 28-1(i) (ii). "These requirements are not to be taken lightly." *Johnson v. City of Fort Lauderdale, Fla.*, 126 F.3d 1372, 1373 (11th Cir. 1997). Defendants respectfully submit that counsel for Plaintiff/Appellant has not met this high standard.

WHEREFORE, Defendants urge the Court to grant their motion to strike and disregard those portions of the

Brief of Appellant which violate F.R.A.P. 28(a), 11th Cir. R. 28-4, 11th Cir. R. 28-1(i) and 11th Cir. R. 30-1.

This 8th day of October 1999.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **APPELLEES' MOTION TO STRIKE**, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Demosthenes Lorandos
214 North Fourth Avenue
Ann Arbor, Michigan 48104

Attorney for Plaintiff/Appellant

This 8th day of October 1999.

/s/ Carol Atha Cosgrove
CAROL ATHA COSGROVE

RESPONDENTS' APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-10815-DD

JAMES CLYDE LAMON,

Plaintiff-Appellant

versus

LYNETTE CONNER,
LYNNE TURNER,
ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

(Filed Oct. 29, 1999)

ORDER:

Appellees' motion to strike portions of Appellant's brief, construed as a motion to strike portions of Appellant's brief and record excerpts, is GRANTED. Appellant is directed to file a corrected brief and corrected record excerpts within fourteen (14) days of the date of this Order. *See* 11th Cir. R. 28-4, 30-1.

Appellant's motion to supplement the record on appeal is DENIED.

/s/ Frank M. Hull
UNITED STATES CIRCUIT
JUDGE